COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 052734-98**

Paula A. Tredo	Employee
City of Springfield School Department	Employer
City of Springfield	Self-insurer

REVIEWING BOARD DECISION
(Judges Costigan, McCarthy and Horan)

APPEARANCES
Ronald C. Kidd, Esq., for the employee
Michael E. Mulcahy, Esq., for the self-insurer

COSTIGAN, J. The employee appeals from a decision in which an administrative judge found, as she alleged, that left foot complaints she developed in 1999 were causally related to her 1998 work-related right leg injury, but denied her claim for permanent and total incapacity benefits. The employee argues that the judge's findings on the extent of her disability were arbitrary and capricious. As the judge, at a minimum, misapprehended the evidence, we agree, and recommit the case for further subsidiary findings of fact.

The employee, fifty-nine years old at the time of the hearing, had worked as a secretary in the Springfield School Department for forty years before her industrial accident. On November 30, 1998, she injured her right leg when she fell at work. The resulting abrasion and bruise on her right ankle did not heal, in spite of multiple surgeries. Over the next two years, the employee's right ankle problems affected her gait, and she developed problems with her left heel. Eventually an open wound with drainage developed and, in the summer of 2000, she underwent surgeries to both feet. (Dec. 2-3.) Her right leg eventually healed,[1] albeit with constant pain and numbness necessitating the use of a cane. However,

[1] The employee argues that this finding by the judge is "completely contrary to the uncontradicted findings of the Departmental Impartial Dr. C. David Bomar, who

as of the hearing on October 18, 2002, her left heel still had not healed, and she could not put on a shoe.[2] The employee expected to undergo further surgeries on the left heel. (Dec. 2-3.)

As originally filed, the employee's claim was for medical benefits relating to her left foot treatment and surgeries. Following a § 10A conference, the self-insurer was ordered to pay such benefits, and it appealed. Prior to hearing, the judge allowed the employee's motion to join a claim for § 34A permanent and total incapacity benefits. (Dec. 2.) Pursuant to § 11A, the employee was examined by Dr. C. David Bomar on December 5, 2001. (Stat. Ex. 1.) Dr. Bomar opined that the employee's altered gait, due to her right leg injury, was one among many causative factors in the development of her left heel ulceration.[3] The doctor opined that the employee had a partial disability, with restrictions against prolonged walking, but she could walk short distances without difficulty and had

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diagnoses Ms. Tredo with 'ulceration of the left heel and [a] chronic non-healing wound of the right leg.' ([R]ep. of Dr. Bomar at 2.) " (Employee br., 4; emphasis added.) We note that the doctor actually used the past tense -- those "were" the employee's diagnoses -- and in the very next sentence, he stated, "[a]t this time, both the heel and the right leg are covered without any open areas." (Stat. Ex. 1, p. 2.) The employee also ignores the doctor's other statements that she "had further procedures with eventual healing of the wound of the right lower leg," and "[f]inal healing of the wound apparently occurred some time in the year 2000." (Stat. Ex. 1, p. 1.)

[2] Although the judge found that the employee could not put a shoe on her left foot, it seems she was wearing one at the hearing:

> Q. Since that time, how has the [left] heel been?
> A. It has not healed. I mean, it heals to a point and then it opens up again, to the point where I cannot put a shoe on it hurts me so bad.
> Q. Let me ask you this. If you looked at it, *without taking the shoe off*, if you looked at it, what would it look like?
> A. It's a slit about an inch long.

(Tr. 23; emphasis added.)

[3] The doctor also cited the employee's chronic smoking, chronic treatments for leukemia and chronic Prednisone use as other risk factors. (Dec. 2-3.) "I think that the most logical conclusion would be that this patient had a number of causative factors as noted above and that the altered gait was one of them." (Stat. Ex. 1, p. 3.)

unlimited ability to sit and use her hands. The doctor specifically opined that the employee was suited for the type of clerical work she did prior to her November 1998 injury. (Dec. 3-4; Stat. Ex. 1, p. 3.)

At the hearing, the employer's witness, David Cruise, testified that the employee could have been accommodated in a secretarial position on the second floor of the central office, where she had worked before her injury. The office was handicap accessible via an elevator, and there was a bathroom on the floor. (Tr. 38-44.) The judge found that the "job would have been primarily sedentary, although there would be some walking around, even with accommodations." (Dec. 3.)

The employee, however, purportedly took an early retirement package from the City sometime prior to the hearing.[4] Although the judge credited the employee's testimony by finding that her left heel problems were related to her right leg injury, he concluded:

> [E]ven with the restrictions outlined by the impartial doctor . . . Ms. Tredo could and would have been accommodated by her employer. Her choice to take the early retirement package, although understandable under the circumstances, was not one that she had to do based solely on her injury. She could have chosen to continue working, and therefore no weekly benefits are due her.

(Dec. 4.) Thus, though he awarded the medical benefits claimed, the judge denied the employee's claim for permanent and total incapacity benefits. (Dec. 5.)

[4] On an issue apparently viewed as dispositive by the judge, the evidence concerning the employee's retirement is minimal. The employee was never questioned on direct or cross-examination about her retirement. On her Employee Biographical Data form, admitted into evidence at the October 2002 hearing, she identified her most recent employment as principal clerk with the City of Springfield from "1962 to date." (Employee Ex. 1.) David Cruise testified that the employee had retired under a one-time, five year add-on, early retirement incentive program, but as to when she retired, he was no more specific than "in the spring." (Tr. 45.)

On appeal, the employee challenges the judge's subsidiary findings of fact on her retirement vis a vis the extent of her disability from and after December 1, 2001. Her arguments are on the mark.

As to the judge's finding that the employer would have accommodated the employee's medical restrictions, (Dec. 4), even the employer's witness acknowledged that no one had actually offered the employee an accommodated job at the time of her early retirement. (Tr. 44-45.) Thus, there was no bona fide job offer from the employer indicative of a corresponding earning capacity under G. L. c. 152, § 35D(3). Moreover, the secretarial job described by Mr. Cruise was on the second floor of a building with an elevator which both the employee and Cruise agreed was unreliable. (Tr. 26, 41.) Nevertheless, the judge found the second floor was "handicapped accessible," while also finding that the employee has difficulty with stairs. (Dec. 3.) To the extent that the judge's findings mischaracterize the uncontradicted evidence, they are arbitrary and capricious.

The judge's finding that the employee "could have chosen to *continue working*," (Dec. 4; emphasis added), is inexplicable. The employee never returned to work after her November 1998 injury. By virtue of its voluntary payment of § 34 benefits for the 156-week statutory maximum period, the self-insurer accepted that the employee remained totally incapacitated, at least to December 1, 2001. The judge's apparent misapprehension of the employee's disability, both when she exhausted § 34 benefits and when she retired, skewed his view of her entitlement to further benefits. Therefore, the judge's finding that the employee could have continued working is also arbitrary and capricious.

Finally, even if warranted by the evidence, see footnote 4, supra, the judge's finding that the employee took a voluntary, non-disability-related retirement when she was in her late fifties has no bearing on the issue of her entitlement to further weekly incapacity benefits. Neither the employee's age when she retired, nor her claim for § 34A permanent and total incapacity benefits,

could invoke application of G. L. c. 152, § 35E,[5] to bar her claim. Contrast McDonough's Case, 440 Mass. 603, 606 (2003)(no benefit entitlement under § 31 where decedent employee was "not in receipt of any earnings-related income at the time of his death.")[6] Moreover, voluntary termination of one's employment

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[5] Section 35E of G. L. c. 152, as amended by St. 1991, c. 398, § 66, provides in pertinent part:

> Any employee who is at least sixty-five years of age and has been out of the labor force for a period of at least two years and is . . . eligible for benefits from a public or private pension which is paid in part or entirely by an employer shall not be entitled to benefits under sections thirty-four or thirty-five unless such employee can establish that but for the injury, . . . she would have remained active in the labor market.

[6] Although not cited to us, we are concerned that our holding in Chinetti v. Boston Edison Co., 13 Mass. Workers' Comp. Rep. 328 (1999), might be read to require an employee to prove causal relationship between the early retirement and the industrial injury, in order for such retirement not to bar receipt of benefits. Id. at 330-331. To the extent that the case might be so read, we decline to follow it. In any event, the final statement of the law in Chinetti comports with our understanding:

> Clearly, the fact of receipt of private pensions or retirement benefits that are generally cumulatively earned during one's work life, does not preclude receipt of workers' compensation except in the instances outlined in § 35E, which is inapposite here. See G. L. c. 152, § 35E; 9 Larson, Workers' Compensation Law § 97.51 (1997).

Chinetti at 331. Chinetti is also distinguishable because the employee, unlike Ms. Tredo, was working at the time of his early retirement. We further note that Chinetti was decided prior to McDonough, supra. As discussed in footnote 4, supra, Ms. Tredo did not testify at all about her retirement. That issue, which we consider a red herring, was born of the testimony of the employer's witness, Mr. Cruise. Finally, G. L. c. 152, § 38, as amended by St. 1986, c. 662, § 33, provides:

> Except as expressly provided elsewhere in this chapter, no savings or insurance of the injured employee independent of this chapter shall be considered in determining compensation payable thereunder, nor shall benefits derived from any other source than the insurer be considered in such determination.

In Mizrahi's Case, 320 Mass. 733, 737 (1947), § 38 was interpreted to exclude "pension plans governmental or otherwise" from consideration.

does not, by itself, warrant denial of a claim for partial incapacity compensation. Seymour's Case, 6 Mass. App. Ct. 935, 936 (1978.) In denying the employee's claim based on her retirement, the judge applied a mutant form of § 35E when the self-insurer did not raise the issue of retirement in defense of the claim at any time prior to the commencement of lay testimony. See [Self-i]ns. Ex. 1. Therefore, the judge's use of her retirement as the basis for denying the employee incapacity benefits was beyond the scope of his authority. G. L. c. 152, § 11C.

Lastly, we point out that the employee's failure to claim § 35 partial incapacity benefits in the alternative does not bar the judge's award of such compensation, if he determines that the employee proved entitlement. See Devaney v. Webster Eng'g, 14 Mass. Workers' Comp. Rep. 359, 361 (2000), citing Fragale v. MCF Indus., 9 Mass. Workers' Comp. Rep. 168, 171-172 (1995)("On recommittal, the judge must award the 'lesser included' § 35 benefits if the evidence and his subsidiary findings of fact so warrant").

Accordingly, we recommit this case for further findings of fact consistent with this opinion. We affirm the decision in all other respects.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **May 20, 2005**